

## ZONING BOARD OF ADJUSTMENT

DRAFT – Minutes of June 14, 2011

**ATTENDEES:** Doug Kirkwood - Chairman, Wil Sullivan, Alternate, James Quinn, Alternate, Robert Rowe, Beth Davis, Alternate, Joe Taggart, and Charlie Tiedemann – Planning Director

The meeting was opened at 7:05 p.m. Introductions of Board members were made and an explanation of the procedures was given by Doug Kirkwood.

**Deliberations:** Minutes of May 17, 2011. The minutes were held to be approved at another meeting.

Doug Kirkwood asked that Beth Davis vote in the absence of Jamie Ramsay, and Wil Sullivan to vote for Carl Miller.

**Case 1459: Lot 4-137-9 Chandler Lane:** *Variance* – Anthony R. Joyce and Susan M. Joyce, 8 Chandler Lane, Amherst, NH 03031 (owners), request a Variance to construct a swimming pool that will be 25.8 feet more or less (side setback) and 21.8 feet more or less (rear setback) from a self imposed condition, at the time of approval of the subdivision of these lots, to conform to the existing covenants which included a thirty-five (35) foot building setback from the side and rear of the lots. Residential / Rural Zone

Anthony Joyce, property owner representing the applicants, explained they have a good size lot and intended to put in a swimming pool, but upon pulling a permit it was found there is a 35 foot setback on the lot. The pool will not fit within that setback and therefore they are requesting the Variance to bring it back to the setbacks of the Town of Amherst. Doug Kirkwood asked about the different tests and asked that they be reviewed. Wil Sullivan asked what a “self-imposed setback” is. Beth Davis also has questions on that; there was no condition on the approval. Charlie Tiedemann explained the lot before it was subdivided was part of another subdivision which had covenants. It became a self-imposed setback, which is what shows on the plan. The developer wanted to go by the covenant restrictions which were more restrictive. Beth Davis said relief is being requested but all of those lots are subjected to the more restrictive restriction. This Board could act on the relief being requested, but it does not eliminate the requirements for all the other lot owners. Charlie Tiedemann said that has been explained to the landowner. Mr. Joyce asked if a swimming pool meets the conditions of a structure. Robert Rowe said it does, it is considered a structure. Doug Kirkwood explained the approved plan shows the setbacks are 35 feet. Beth Davis disagreed stating the plan shows 20 feet. After some discussion it was agreed the setback on the plan does show 35 feet.

Jim Quinn asked Beth Davis asked what her point is. Beth Davis is not sure that the self-imposed restriction with 35 foot setback rises to the level of the Zoning Ordinance. The

47 setback for which the relief is being sought is not 35 feet. Joe Taggart said the applicant  
48 does not need relief from the Amherst Zoning Ordinance because it would be within the  
49 Town Ordinance as planned. He does not see a violation of the Ordinance. Beth Davis is  
50 raising the question of whether or not this application is required to be seen by Board; the  
51 applicant needs relief from the covenants not the Ordinance. If the Planning Board  
52 approved the subdivision with the 35 foot setback, then there is a gray area – it is not the  
53 Ordinance. Robert Rowe believes that is incorrect; the zoning authority is only to the  
54 zoning laws, we can't correct the rights of other people in the subdivision. There is a  
55 small amount (of the pool) within the 20 foot setback, this Board can grant relief from  
56 that, but that is not what is requested. Beth Davis agreed the southeast corner does go  
57 into the setback.

58  
59 Doug Kirkwood asked if, being more restrictive, that plan became a matter of public  
60 record under the jurisdiction of the town. Robert Rowe suggested the more restrictive  
61 covenant does not make it a requirement of the Zoning Board. Wil Sullivan suggested  
62 the Ordinance authorizes the ZBA authority. Joe Taggart also agreed it is gray and would  
63 become a public issue with those covenants on the plan for the subdivision. Beth Davis  
64 questions if this Board and not the Planning Board would have the authority – this was  
65 exchanged for the increased restriction. Robert Rowe suggested moving forward since a  
66 small section goes into the 20 foot setback and talk about granting a Variance for that.  
67 Wil Sullivan asked what is inside the 20 foot setback. Doug Kirkwood asked if this  
68 Board should hear the case at all.

69  
70 Doug Kirkwood asked what board would have the ability to modify a plan approved by  
71 the Town. It's either the BOS or ZBA. Jim Quinn asked if the other homeowners would  
72 need to sign off to grant relief. Mr. Joyce noted that when the permit was pulled was  
73 when this issue came up. Doug Kirkwood read from the Ordinance. Joe Taggart asked  
74 about a Variance with conditions, if the conditions are not upheld, what would that  
75 person be in violation with? Doug Kirkwood responded the conditions would be under  
76 the rules they must operate by and become law of the Town. Robert Rowe noted that the  
77 other 14 owners might also be in violation of the covenants. Mr. Joyce said they did not  
78 know. Robert Rowe would only feel comfortable if Charlie Tiedemann turned down the  
79 Building Permit and the applicant came in for an appeal of his decision. Beth Davis said  
80 that is what happened. Charlie Tiedemann noted the plan clearly shows a 35 foot setback  
81 and suggested that there are three lawyers here that don't agree and to send this to Town  
82 Counsel for review. Beth Davis thinks the permit is able to be issued.

83  
84 Erol Duymazlar, member of the audience, said he was involved in the original  
85 development of that property and it was part of a prior subdivision that the developer did  
86 not want to violate. They kept the 35 foot setback and complied with the Planning  
87 Board's regulations. Beth Davis suggested it was more self imposed; it was not that the  
88 Planning Board said it had to be done as a condition. Mr. Duymazlar said it was imposed  
89 on the developer when the property was purchased for development. Doug Kirkwood  
90 asked if the ZBA wanted to proceed and treat this as a Variance, to decide there is no  
91 restriction or treat it as an Administrative Appeal in which case it may need to be re-

noticed. Robert Rowe said he would only be comfortable if there was a motion that the ZBA has authority on the private covenants.

*Wil Sullivan moved to hear the applicant who has stated the structure will be in the setback. There was no second, therefore the motion failed.*

Mr. Joyce said it does not have to be in the 20 foot setback, it could be altered to be within the setback. Charlie Tiedemann suggested if a pool has sidewalks around it, the sidewalks (apron) are not counted, just look at the structure (pool) which is 21.8 feet. Take the 35 foot setback as presented and whether or not it is erroneous, and then make the decision and Charlie Tiedemann will deal with it. Beth Davis said if it is approved by the ZBA, he will issue a permit. Beth Davis stated the applicant does not need relief from the Ordinance. If a building permit is denied, he can use the Administrative Appeal for the decision of the zoning administrator for denial. The ZBA would have to act on that.

Charlie Tiedemann said the applicant would like to use the pool this summer and the process won't be done in time for that. Wil Sullivan said the plan states the private setback covenants and what they are. Doug Kirkwood indicated the ZBA just needs the information that the covenants exist and are recorded. Beth Davis responded that the covenants do not say 35 feet, they say in accordance with the "town requirements." Mr. Duymazlar responded it is on the original Cricket Hill covenants that the subdivision adopted. Joe Taggart asked if the ZBA can rule on it with a condition that the ZBA determines the case and if not it is without prejudice.

Robert Rowe feels he has no authority for this and will not sit on this case. The only solution is to ask for a permit tomorrow. Mr. Joyce has a permit, but will Charlie Tiedemann sign it? Charlie Tiedemann said he will not sign it unless this Board does something. Robert Rowe recommended Charlie Tiedemann to contact Town Counsel Bill Drescher. Charlie Tiedemann responded that advice from Mr. Drescher can take from 3 to 6 months. Beth Davis said Charlie Tiedemann does not agree with the 3 attorneys on the ZBA.

*Robert Rowe moved to table this to the next ZBA meeting to give the applicant time to seek the permit from Charlie Tiedemann who will notify Town Counsel which Charlie Tiedemann stated will take between 3-6 months. There was no second, therefore the motion failed. Robert Rowe withdrew his motion.*

Doug Kirkwood said he will call Bill Drescher and convey the information to Charlie Tiedemann. Mr. Joyce said he will put the pool 19 feet from the setback. Joe Taggart indicated that the plan says 21+/- feet so he feels it will be within the envelope.

Doug Kirkwood indicated the ZBA can proceed treating this as a Variance or the applicant must file for an Appeal of the Administrative Decision. Robert Rowe has no problem hearing it if it is within the 20 feet, but the applicant will still need to wait 30 days for the building permit. If the Administrative Appeal route is taken, the 30 days will

138 still need to be waited for, another application must be filed and the hearing will move  
139 into September. Charlie Tiedemann said it could be put on the third Tuesday in July.  
140 Mr. Joyce would like the quickest route, it is a gray area, if the pool needs to move into  
141 the 20 foot setback for the ZBA to have jurisdiction, and he will do that. He would like  
142 to do this as fast as possible. Doug Kirkwood understands the applicant's situation, but  
143 this Board makes an effort to be pragmatic. Robert Rowe suggested hearing this as a  
144 Variance and still calling Bill Drescher tomorrow to get his opinion. Doug Kirkwood  
145 noted this was posted differently (which is not what was on the plan and posted) it has  
146 changed after posting. Joe Taggart asked if the applicant is able to make minor changes  
147 to the plan. Doug Kirkwood said this Board has to rule with what is posted. Joe Taggart  
148 agreed, but if a minor change is made, is that acceptable?

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150 Mr. Joyce asked if the Variance can move forward.

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152 *Joe Taggart moved to hear the case encroaching on 35 foot setback conditioned upon*  
153 *determination of whether or not this board has the authority to do so.*

154  
155 Robert Rowe asked if a statement could be made that the Zoning Board finds it does not  
156 have any authority to grant Variances from private covenants only from specific Zoning  
157 Ordinances, that way the applicant can go in for a building permit. Beth Davis asked if  
158 there is a reason why Charlie Tiedemann is hesitant on the building permit. Charlie  
159 Tiedemann said it is a unique situation, it is a 35 foot setback and it is clearly shown on  
160 the plan and if an attorney says different (hired by the Town) he will change his mind.  
161 Beth Davis asked what Charlie Tiedemann is worried about? Charlie Tiedemann  
162 responded violating the setback. Robert Rowe said the setback on the plan is part of the  
163 Ordinance a condition of approval of the subdivision. Charlie Tiedemann noted the 35  
164 foot setback is on the plan, that is what he must go by. Joe Taggart agreed with Robert  
165 Rowe that the ZBA can't beat up on Charlie Tiedemann. Robert Rowe suggested this be  
166 tabled and Doug Kirkwood makes a call to Bill Drescher, however unfortunate for the  
167 applicant.

168  
169 Mr. Joyce asked if a Variance would release Charlie Tiedemann's responsibility. Charlie  
170 Tiedemann responded absolutely, the applicant would be in business tomorrow with that.

171  
172 *There was no second to the motion therefore it failed.*

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174 *Robert Rowe moved to table this matter until next month. Joe Taggart seconded. All*  
175 *were in favor except Joe Taggart who abstained. Motion passed.*

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178 **Case 1460: Lot 2-169-3 Boston Post Road:** *Special Exception* – Ducal Development,  
179 LLC, 2 Sky Meadow Drive, Nashua, NH 03062 (owner), requests a Special Exception  
180 from the provisions of the Amherst Zoning Ordinance Art. V, Sec. 5.4, Para. 5.4.4  
181 Accessory Apartment. In order that they may construct an Accessory Apartment in  
182 accordance with the Zoning Ordinance. Residential / Rural Zone (Aquifer Conservation  
183 District overlay)

Ken Clinton, LLS, from Meridian Land Services and representing the applicant, presented the application for an Accessory Apartment on this lot, the lot is 2-169-3, a 2.7 acre vacant lot.

Ken Clinton proceeded through the questions:

Lot conformance – approved by the Planning Board last fall, one house to remain on the lot, this is the most northwestern lot in the subdivision. Common driveway, approved by Planning Board, met with DPW and found it to be in compliance and safe. The applicant may want to separate the driveways at some point and would go back to the Planning Board for that. No adverse impacts to the town, the use is consistent; a septic design was submitted for a 4-bedroom house and has no adverse impact. A kitchenette for an accessory apartment is in the plan. Objectionable to nearby properties, it will meet current building codes, this will be residential. The Special Exception is for an Accessory Apartment, the plan shows the requirements. This is within the Aquifer Conservation District but will not affect the groundwater and will meet the Zoning Ordinance.

Doug Kirkwood asked if the septic approval went through the state. Ken Clinton responded it goes through Charlie Tiedemann first then the State. The apartment is under 800 sf (exterior measurement). Doug Kirkwood asked for questions from the public, there were none.

### **DELIBERATIONS:**

*Wil Sullivan moved to enter deliberations. Robert Rowe seconded. All were in favor.*

#### Case 1460:

There was no general discussion.

*Robert Rowe moved no regional impact. Beth Davis seconded. All were in favor.*

Tests:

II. Conclusions (RSA 674:33):

1. The use is allowed in the Zoning Ordinance? BD yes, JT yes, WS yes, RR yes, DK yes  
True: 5, Not True: 0

2. That the property is in conformance with the dimensional requirements of the zone and the use is compatible with the Amherst Master Plan? RR yes, WS yes, JT yes, BD yes, DK yes  
True: 5, Not True: 0

3. There is safe vehicular and pedestrian access? WS yes, RR yes, BD yes, JT yes, DK yes  
True: 5, Not True: 0

- 231 4. There will be no significant adverse impacts from the proposed use on safety and general  
232 welfare of the neighborhood and Town? JT yes, BD yes, RR yes, WS yes, DK yes  
233 True: 5, Not True: 0  
234  
235 5. The use will not be more objectionable to nearby properties by reason of noise, fumes, or  
236 inappropriate lighting than existing use? BD yes, RR yes, WS yes, JT yes, DK yes  
237 True: 5, Not True: 0  
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239 6. The plan submitted by applicant / owner accurately depicts the use? RR yes, JT yes, WS  
240 yes, BD yes, DK yes  
241 True: 5, Not True: 0  
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243 7. The use will not affect the ground water? WS yes, RR yes, BD yes, JT yes, DK yes  
244 True: 5, Not True: 0  
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247 The applicant passed on the tests, therefore the Special Exception is approved.  
248

249 *Robert Rowe moved to come out of deliberations. Beth Davis seconded. All were in*  
250 *favor.*  
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253 **New Business:**

1. Election of Officers of the Zoning Board of Adjustment  
2. Discussion of appointment of alternates to the ZBA

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256 Robert Rowe indicated one case took 1.5 hours tonight and nothing was done and the  
257 second one took a half hour and it was approved.  
258

259 Doug Kirkwood noted the ZBA is missing two regular members tonight, so we have to  
260 postpone the election of officers which pushes it into August. Joe Taggart has been  
261 sworn in. Only three regular members present tonight.  
262

263 Traditionally, Charlie Tiedemann said the Board waits for five full members for  
264 elections. All agreed.  
265

266 *Robert Rowe moved to adjourn at 9:50 p.m. Joe Taggart seconded. All were in favor.*  
267 *Motion passed.*  
268

269 Respectfully submitted,  
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272

273 Darlene J. Bouffard  
274 Recording Secretary  
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